

§ 80.1165 What are the additional requirements under this subpart for a foreign small refiner?

(a) *Definitions.* The following definitions apply for this subpart:

(1) *Foreign refinery* is a refinery that is located outside the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as “the United States”).

(2) *Foreign refiner* is a person that meets the definition of refiner under § 80.2(i) for a foreign refinery.

(3) *RFS-FRGAS* is gasoline produced at a foreign refinery that has received a small refinery exemption under § 80.1141 or a small refiner exemption under § 80.1142 that is imported into the United States.

(4) *Non-RFS-FRGAS* is one of the following:

(i) Gasoline produced at a foreign refinery that has received a small refinery exemption under § 80.1141 or a small refiner exemption under § 80.1142 that is not imported into the United States.

(ii) Gasoline produced at a foreign refinery that has not received a small refinery exemption under § 80.1141 or small refiner exemption under § 80.1142.

(5) A foreign small refiner is a foreign refiner that has received a small refinery exemption under § 80.1141 for one or more of its refineries or a small refiner exemption under § 80.1142.

(b) *General requirements for RFS-FRGAS foreign small refineries and small refiners.*

(1) A foreign small refiner must designate, at the time of production, each batch of gasoline produced at the foreign refinery that is exported for use in the United States as RFS-FRGAS; and

(2) Meet all requirements that apply to refiners who have received a small refinery or small refiner exemption under this subpart.

(c) *Designation, foreign refiner certification, and product transfer documents.*

(1) Any foreign small refiner must designate each batch of RFS-FRGAS as such at the time the gasoline is produced.

(2) On each occasion when RFS-FRGAS is loaded onto a vessel or other transportation mode for transport to

the United States, the foreign refiner shall prepare a certification for each batch of RFS-FRGAS that meets all the following requirements:

(i) The certification shall include the report of the independent third party under paragraph (d) of this section, and all the following additional information:

(A) The name and EPA registration number of the refinery that produced the RFS-FRGAS.

(B) [Reserved]

(ii) The identification of the gasoline as RFS-FRGAS.

(iii) The volume of RFS-FRGAS being transported, in gallons.

(3) On each occasion when any person transfers custody or title to any RFS-FRGAS prior to its being imported into the United States, it must include all the following information as part of the product transfer document information:

(i) Designation of the gasoline as RFS-FRGAS.

(ii) The certification required under paragraph (c)(2) of this section.

(d) *Load port independent testing and refinery identification.* (1) On each occasion that RFS-FRGAS is loaded onto a vessel for transport to the United States the foreign small refiner shall have an independent third party do all the following:

(i) Inspect the vessel prior to loading and determine the volume of any tank bottoms.

(ii) Determine the volume of RFS-FRGAS loaded onto the vessel (exclusive of any tank bottoms before loading).

(iii) Obtain the EPA-assigned registration number of the foreign refinery.

(iv) Determine the name and country of registration of the vessel used to transport the RFS-FRGAS to the United States.

(v) Determine the date and time the vessel departs the port serving the foreign refinery.

(vi) Review original documents that reflect movement and storage of the RFS-FRGAS from the foreign refinery to the load port, and from this review determine:

(A) The refinery at which the RFS-FRGAS was produced; and

(B) That the RFS-FRGAS remained segregated from Non-RFS-FRGAS and other RFS-FRGAS produced at a different refinery.

(2) The independent third party shall submit a report to:

(i) The foreign small refiner containing the information required under paragraph (d)(1) of this section, to accompany the product transfer documents for the vessel; and

(ii) The Administrator containing the information required under paragraph (d)(1) of this section, within thirty days following the date of the independent third party's inspection. This report shall include a description of the method used to determine the identity of the refinery at which the gasoline was produced, assurance that the gasoline remained segregated as specified in paragraph (j)(1) of this section, and a description of the gasoline's movement and storage between production at the source refinery and vessel loading.

(3) The independent third party must:

(i) Be approved in advance by EPA, based on a demonstration of ability to perform the procedures required in this paragraph (d);

(ii) Be independent under the criteria specified in § 80.65(f)(2)(iii); and

(iii) Sign a commitment that contains the provisions specified in paragraph (f) of this section with regard to activities, facilities, and documents relevant to compliance with the requirements of this paragraph (d).

(e) *Comparison of load port and port of entry testing.* (1)(i) Any small foreign refiner and any United States importer of RFS-FRGAS shall compare the results from the load port testing under paragraph (d) of this section, with the port of entry testing as reported under paragraph (k) of this section, for the volume of gasoline, except as specified in paragraph (e)(1)(ii) of this section.

(ii) Where a vessel transporting RFS-FRGAS off loads this gasoline at more than one United States port of entry, the requirements of paragraph (e)(1)(i) of this section do not apply at subsequent ports of entry if the United States importer obtains a certification from the vessel owner that the requirements of paragraph (e)(1)(i) of this section were met and that the vessel has

not loaded any gasoline or blendstock between the first United States port of entry and the subsequent port of entry.

(2) If the temperature-corrected volumes determined at the port of entry and at the load port differ by more than one percent, the United States importer and the foreign small refiner shall not treat the gasoline as RFS-FRGAS and the importer shall include the volume of gasoline in the importer's RFS compliance calculations.

(f) *Foreign refiner commitments.* Any small foreign small refiner shall commit to and comply with the provisions contained in this paragraph (f) as a condition to being approved for a small refinery or small refiner exemption under this subpart.

(1) Any United States Environmental Protection Agency inspector or auditor must be given full, complete and immediate access to conduct inspections and audits of the foreign refinery.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced.

(ii) Access will be provided to any location where:

(A) Gasoline is produced;

(B) Documents related to refinery operations are kept; and

(C) RFS-FRGAS is stored or transported between the foreign refinery and the United States, including storage tanks, vessels and pipelines.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits must be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to all the following:

(A) The volume of RFS-FRGAS.

(B) The proper classification of gasoline as being RFS-FRGAS or as not being RFS-FRGAS.

(C) Transfers of title or custody to RFS-FRGAS.

(D) Testing of RFS-FRGAS.

(E) Work performed and reports prepared by independent third parties and by independent auditors under the requirements of this section, including work papers.

(vi) Inspections and audits by EPA may include interviewing employees.

(vii) Any employee of the foreign refiner must be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents must be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters must be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia shall be named, and service on this agent constitutes service on the foreign refiner or any employee of the foreign refiner for any action by EPA or otherwise by the United States related to the requirements of this subpart.

(3) The forum for any civil or criminal enforcement action related to the provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws shall apply to any civil or criminal enforcement action against the foreign refiner or any employee of the foreign refiner related to the provisions of this section.

(5) Submitting an application for a small refinery or small refiner exemption, or producing and exporting gasoline under such exemption, and all other actions to comply with the requirements of this subpart relating to such exemption constitute actions or activities covered by and within the meaning of the provisions of 28 U.S.C. 1605(a)(2), but solely with respect to actions instituted against the foreign refiner, its agents and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refiner under this subpart, including conduct that violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413).

(6) The foreign refiner, or its agents or employees, will not seek to detain or to impose civil or criminal remedies

against EPA inspectors or auditors, whether EPA employees or EPA contractors, for actions performed within the scope of EPA employment related to the provisions of this section.

(7) The commitment required by this paragraph (f) shall be signed by the owner or president of the foreign refiner business.

(8) In any case where RFS-~~FRGAS~~ produced at a foreign refinery is stored or transported by another company between the refinery and the vessel that transports the RFS-~~FRGAS~~ to the United States, the foreign refiner shall obtain from each such other company a commitment that meets the requirements specified in paragraphs (f)(1) through (f)(7) of this section, and these commitments shall be included in the foreign refiner's application for a small refinery or small refiner exemption under this subpart.

(g) *Sovereign immunity.* By submitting an application for a small refinery or small refiner exemption under this subpart, or by producing and exporting gasoline to the United States under such exemption, the foreign refiner, and its agents and employees, without exception, become subject to the full operation of the administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity, with respect to actions instituted against the foreign refiner, its agents and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refiner under this subpart, including conduct that violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413).

(h) *Bond posting.* Any foreign refiner shall meet the requirements of this paragraph (h) as a condition to approval of a small foreign refinery or small foreign refiner exemption under this subpart.

(1) The foreign refiner shall post a bond of the amount calculated using the following equation:

$$\text{Bond} = G * \$0.01$$

Where:

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Bond = amount of the bond in United States dollars.

G = the largest volume of gasoline produced at the foreign refinery and exported to the United States, in gallons, during a single calendar year among the most recent of the following calendar years, up to a maximum of five calendar years: The calendar year immediately preceding the date the refinery's application is submitted, the calendar year the application is submitted, and each succeeding calendar year.

(2) Bonds shall be posted by:

(i) Paying the amount of the bond to the Treasurer of the United States;

(ii) Obtaining a bond in the proper amount from a third party surety agent that is payable to satisfy United States administrative or judicial judgments against the foreign refiner, provided EPA agrees in advance as to the third party and the nature of the surety agreement; or

(iii) An alternative commitment that results in assets of an appropriate liquidity and value being readily available to the United States, provided EPA agrees in advance as to the alternative commitment.

(3) Bonds posted under this paragraph (h) shall:

(i) Be used to satisfy any judicial judgment that results from an administrative or judicial enforcement action for conduct in violation of this subpart, including where such conduct violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413);

(ii) Be provided by a corporate surety that is listed in the United States Department of Treasury Circular 570 "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds"; and

(iii) Include a commitment that the bond will remain in effect for at least five years following the end of latest annual reporting period that the foreign refiner produces gasoline pursuant to the requirements of this subpart.

(4) On any occasion a foreign refiner bond is used to satisfy any judgment, the foreign refiner shall increase the bond to cover the amount used within 90 days of the date the bond is used.

(5) If the bond amount for a foreign refiner increases, the foreign refiner shall increase the bond to cover the

shortfall within 90 days of the date the bond amount changes. If the bond amount decreases, the foreign refiner may reduce the amount of the bond beginning 90 days after the date the bond amount changes.

(i) *English language reports.* Any document submitted to EPA by a foreign refiner shall be in English language, or shall include an English language translation.

(j) *Prohibitions.* (1) No person may combine RFS-FRGAS with any Non-RFS-FRGAS, and no person may combine RFS-FRGAS with any RFS-FRGAS produced at a different refinery, until the importer has met all the requirements of paragraph (k) of this section.

(2) No foreign refiner or other person may cause another person to commit an action prohibited in paragraph (j)(1) of this section, or that otherwise violates the requirements of this section.

(k) *United States importer requirements.* Any United States importer of RFS-FRGAS shall meet the following requirements:

(1) Each batch of imported RFS-FRGAS shall be classified by the importer as being RFS-FRGAS.

(2) Gasoline shall be classified as RFS-FRGAS according to the designation by the foreign refiner if this designation is supported by product transfer documents prepared by the foreign refiner as required in paragraph (c) of this section. Additionally, the importer shall comply with all requirements of this subpart applicable to importers.

(3) For each gasoline batch classified as RFS-FRGAS, any United States importer shall have an independent third party do all the following:

(i) Determine the volume of gasoline in the vessel.

(ii) Use the foreign refiner's RFS-FRGAS certification to determine the name and EPA-assigned registration number of the foreign refinery that produced the RFS-FRGAS.

(iii) Determine the name and country of registration of the vessel used to transport the RFS-FRGAS to the United States.

(iv) Determine the date and time the vessel arrives at the United States port of entry.

(4) Any importer shall submit reports within 30 days following the date any vessel transporting RFS-FRGAS arrives at the United States port of entry to:

(i) The Administrator containing the information determined under paragraph (k)(3) of this section; and

(ii) The foreign refiner containing the information determined under paragraph (k)(3)(i) of this section, and including identification of the port at which the product was off loaded.

(5) Any United States importer shall meet all other requirements of this subpart for any imported gasoline that is not classified as RFS-FRGAS under paragraph (k)(2) of this section.

(1) *Truck imports of RFS-FRGAS produced at a foreign refinery.* (1) Any refiner whose RFS-FRGAS is transported into the United States by truck may petition EPA to use alternative procedures to meet all the following requirements:

(i) Certification under paragraph (c)(2) of this section.

(ii) Load port and port of entry testing requirements under paragraphs (d) and (e) of this section.

(iii) Importer testing requirements under paragraph (k)(3) of this section.

(2) These alternative procedures must ensure RFS-FRGAS remains segregated from Non-RFS-FRGAS until it is imported into the United States. The petition will be evaluated based on whether it adequately addresses the following:

(i) Provisions for monitoring pipeline shipments, if applicable, from the refinery, that ensure segregation of RFS-FRGAS from that refinery from all other gasoline.

(ii) Contracts with any terminals and/or pipelines that receive and/or transport RFS-FRGAS that prohibit the commingling of RFS-FRGAS with Non-RFS-FRGAS or RFS-FRGAS from other foreign refineries.

(iii) Attest procedures to be conducted annually by an independent third party that review loading records and import documents based on volume reconciliation, or other criteria, to confirm that all RFS-FRGAS remains segregated throughout the distribution system.

(3) The petition described in this section must be submitted to EPA along with the application for a small refinery or small refiner exemption under this subpart.

(m) *Additional attest requirements for importers of RFS-FRGAS.* The following additional procedures shall be carried out by any importer of RFS-FRGAS as part of the attest engagement required for importers under this subpart K.

(1) Obtain listings of all tenders of RFS-FRGAS. Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis required in §80.133(b), and to the volumes determined by the third party under paragraph (d) of this section.

(2) For each tender under paragraph (m)(1) of this section, where the gasoline is loaded onto a marine vessel, report as a finding the name and country of registration of each vessel, and the volumes of RFS-FRGAS loaded onto each vessel.

(3) Select a sample from the list of vessels identified in paragraph (m)(2) of this section used to transport RFS-FRGAS, in accordance with the guidelines in §80.127, and for each vessel selected perform the following:

(i) Obtain the report of the independent third party, under paragraph (d) of this section.

(A) Agree the information in these reports with regard to vessel identification and gasoline volume.

(B) Identify, and report as a finding, each occasion the load port and port of entry volume results differ by more than the amount allowed in paragraph (e)(2) of this section, and determine whether all of the requirements of paragraph (e)(2) of this section have been met.

(ii) Obtain the documents used by the independent third party to determine transportation and storage of the RFS-FRGAS from the refinery to the load port, under paragraph (d) of this section. Obtain tank activity records for any storage tank where the RFS-FRGAS is stored, and pipeline activity records for any pipeline used to transport the RFS-FRGAS prior to being loaded onto the vessel. Use these records to determine whether the RFS-FRGAS was produced at the refinery

that is the subject of the attest engagement, and whether the RFS-FRGAS was mixed with any Non-RFS-FRGAS or any RFS-FRGAS produced at a different refinery.

(4) Select a sample from the list of vessels identified in paragraph (m)(2) of this section used to transport RFS-FRGAS, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(i) Obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure of the vessel, and the port of entry and date of arrival of the vessel.

(ii) Agree the vessel's departure and arrival locations and dates from the independent third party and United States importer reports to the information contained in the commercial document.

(5) Obtain separate listings of all tenders of RFS-FRGAS, and perform the following:

(i) Agree the volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.133(b).

(ii) Obtain a separate listing of the tenders under this paragraph (m)(5) where the gasoline is loaded onto a marine vessel. Select a sample from this listing in accordance with the guidelines in § 80.127, and obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure and the ports and dates where the gasoline was off loaded for the selected vessels. Determine and report as a finding the country where the gasoline was off loaded for each vessel selected.

(6) In order to complete the requirements of this paragraph (m), an auditor shall:

(i) Be independent of the foreign refiner or importer;

(ii) Be licensed as a Certified Public Accountant in the United States and a citizen of the United States, or be approved in advance by EPA based on a demonstration of ability to perform the procedures required in §§ 80.125 through 80.127, 80.130, 80.1164, and this paragraph (m); and

(iii) Sign a commitment that contains the provisions specified in para-

graph (f) of this section with regard to activities and documents relevant to compliance with the requirements of §§ 80.125 through 80.127, 80.130, 80.1164, and this paragraph (m).

(n) *Withdrawal or suspension of foreign refiner status.* EPA may withdraw or suspend a foreign refiner's small refinery or small refiner exemption where:

(1) A foreign refiner fails to meet any requirement of this section;

(2) A foreign government fails to allow EPA inspections as provided in paragraph (f)(1) of this section;

(3) A foreign refiner asserts a claim of, or a right to claim, sovereign immunity in an action to enforce the requirements in this subpart; or

(4) A foreign refiner fails to pay a civil or criminal penalty that is not satisfied using the foreign refiner bond specified in paragraph (h) of this section.

(o) *Additional requirements for applications, reports and certificates.* Any application for a small refinery or small refiner exemption, alternative procedures under paragraph (l) of this section, any report, certification, or other submission required under this section shall be:

(1) Submitted in accordance with procedures specified by the Administrator, including use of any forms that may be specified by the Administrator.

(2) Signed by the president or owner of the foreign refiner company, or by that person's immediate designee, and shall contain the following declaration:

I hereby certify: (1) That I have actual authority to sign on behalf of and to bind [insert name of foreign refiner] with regard to all statements contained herein; (2) that I am aware that the information contained herein is being Certified, or submitted to the United States Environmental Protection Agency, under the requirements of 40 CFR part 80, subpart K, and that the information is material for determining compliance under these regulations; and (3) that I have read and understand the information being Certified or submitted, and this information is true, complete and correct to the best of my knowledge and belief after I have taken reasonable and appropriate steps to verify the accuracy thereof. I affirm that I have read and understand the provisions of 40 CFR part 80, subpart K, including 40 CFR 80.1165 apply to [insert name of foreign refiner]. Pursuant to Clean Air Act section 113(c) and 18 U.S.C. 1001, the penalty for furnishing

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false, incomplete or misleading information in this certification or submission is a fine of up to \$10,000 U.S., and/or imprisonment for up to five years.

[72 FR 24004, May 1, 2007, as amended at 73 FR 57258, Oct. 2, 2008]

§ 80.1166 What are the additional requirements under this subpart for a foreign producer of cellulosic biomass ethanol or waste derived ethanol?

(a) *Foreign producer of cellulosic biomass ethanol or waste derived ethanol.* For purposes of this subpart, a foreign producer of cellulosic biomass ethanol or waste derived ethanol is a person located outside the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as "the United States") that has been approved by EPA to assign RINs to cellulosic biomass ethanol or waste derived ethanol that the foreign producer produces and exports to the United States, hereinafter referred to as a "foreign producer" under this section.

(b) *General requirements.* (1) An approved foreign producer under this section must meet all requirements that apply to cellulosic biomass ethanol or waste derived ethanol producers under this subpart, except to the extent otherwise specified in paragraph (b)(2) of this section.

(2)(i) The independent third party that conducts the facility verification required under § 80.1155(a) must inspect the foreign producer's facility and submit a report to EPA which describes in detail the physical plant and its operation.

(ii) The independent third party that conducts the facility verification required under § 80.1155(a) must be a licensed Professional Engineer in the chemical engineering field, but need not be based in the United States. The independent third party must include documentation of its qualifications as a licensed Professional Engineer in the report required in paragraph (b)(2)(i) of this section.

(iii) The requirements of paragraphs (b)(2)(i) and (ii) of this section must be met before a foreign entity may be ap-

proved as a foreign producer under this subpart.

(c) *Designation, foreign producer certification, and product transfer documents.*

(1) Any approved foreign producer under this section must designate each batch of cellulosic biomass ethanol or waste derived ethanol as "RFS-FRETH" at the time the ethanol is produced.

(2) On each occasion when RFS-FRETH is loaded onto a vessel or other transportation mode for transport to the United States, the foreign producer shall prepare a certification for each batch of RFS-FRETH; the certification shall include the report of the independent third party under paragraph (d) of this section, and all the following additional information:

(i) The name and EPA registration number of the company that produced the RFS-FRETH.

(ii) The identification of the ethanol as RFS-FRETH.

(iii) The volume of RFS-FRETH being transported, in gallons.

(3) On each occasion when any person transfers custody or title to any RFS-FRETH prior to its being imported into the United States, it must include all the following information as part of the product transfer document information:

(i) Designation of the ethanol as RFS-FRETH.

(ii) The certification required under paragraph (c)(2) of this section.

(d) *Load port independent testing and refinery identification.* (1) On each occasion that RFS-FRETH is loaded onto a vessel for transport to the United States the foreign producer shall have an independent third party do all the following:

(i) Inspect the vessel prior to loading and determine the volume of any tank bottoms.

(ii) Determine the volume of RFS-FRETH loaded onto the vessel (exclusive of any tank bottoms before loading).

(iii) Obtain the EPA-assigned registration number of the foreign producer.

(iv) Determine the name and country of registration of the vessel used to